Supreme Court
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Case No. 94-1103

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

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FLOYD BOLTON, Petitioner

vs.

SCRIVNER, INC., Respondent

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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# PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 15, 1995

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Case No. 94-1103

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

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| FLOYD BOLTON, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Tenth Circuit |
| | ) | Docket No. 93-6402 |
| SCRIVNER, INC., | ) | |
| | ) | |
| Respondent. | ) | |

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of February, 1995, three (3) true and correct copies of PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was deposited in the United State mail, postage prepaid, to James C. Chandler, Peter Van Dyke, and Sam Reynolds Fulkerson, Lytle Soule & Curlee, 1200 Robinson Renaissance, 119 N. Robinson, Oklahoma City, OK 73102.

Respectfully submitted,

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Case No. 94-1103

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

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FLOYD BOLTON, Petitioner

vs.

SCRIVNER, INC., Respondent

**PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

COMES NOW, the Petitioner, Floyd Bolton, and respectfully requests that the Court consider the arguments set forth in his Reply to the Respondent's Brief in Opposition to Petition for Writ of Certiorari.

## I. PETITIONER RAISES AN IMPORTANT FEDERAL QUESTION

Petitioner questions the veracity of Respondent's claim on page seven of its Brief in Opposition that Bolton fails to identify an important issue of federal law

which should be settled by this Court. The Americans With Disabilities Act, 42 U.S.C. §12101 et seq., (ADA), is an extremely important new piece of federal legislation with far-reaching ramifications in both business and government, as well as in the private lives of individuals. To say that this is not an important issue of federal law is ludicrous.

Further, this Court has not, as yet, proscribed limits for the ADA. Only the Courts of Appeals have considered the many facets of, and issues raised by, this intricate piece of legislation. Although there are numerous guidelines set forth in the Code of Federal Regulations regarding how the ADA should be interpreted, this Court has yet to determine the parameters of those regulations.

There are three important issues

within the ADA which should be addressed by this Court.[1] (1) What is the definition of a "handicapped person" under the ADA? (2) What are the mandatory requirements for showing that a handicapped person is substantially limited in a major life activity? (3) What are the mandatory requirements for a factual and legal showing that a handicapped person is substantially limited in the major life activity of working?

The answers to these questions will have a major effect on the rights of handicapped persons in the workplace. One of the major concerns of Congress in enacting the ADA was its hope that this

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[1]These important issues need to be addressed by this Court, both at the summary judgment stage and at trial, in regards to burden of proof and sufficiency of the evidence.

legislation would greatly reduce discrimination against working handicapped persons. (See Statement of Purpose, 42 U.S.C. §12101., Petition for Certiorari at 2C). If the Tenth Circuit's interpretation of these crucial issues is allowed to stand, then the ADA is no more than a re-hash of the Rehabilitation Act, (29 U.S.C. §701 et seq.), and will have no greater impact in the workplace than that legislation has. This is apparent based on the Tenth Circuit's reliance on Welsh v. City of Tulsa, 977 F.2d 1415 (10th Cir. 1992).

How these questions are finally interpreted by this Court will create a "handbook" for the future of America's workplace. This case is an extremely important one deserving of this Court's review.

## II. THE CODE OF FEDERAL REGULATIONS CONTAINS RECOMMENDATIONS FOR INTERPRETATION OF THE ADA

Respondent has attempted to divert the Court's attention away from the plain language of the regulation found at 29 C.F.R. §1630.2 (j)(3)(ii) on page 16 of its Brief in Opposition. The three factors are ones which may be considered in determining whether a handicapped individual is substantially limited in the major life activity of working, and are clearly not mandatory.

In fact, Respondent supports the permissive nature of the factors by describing them as "illustrative." (See page 16 of Brief in Opposition.) If, as Scrivner claims, Congress intended these factors only to be "illustrative," then how could they alone have doomed Bolton's claim that he was a handicapped individual under the ADA?

In a recent Tenth Circuit decision, the court took a position against the mandatory nature of certain EEOC recommendations for implementing the ADA. In White v. York International, ___ F.3d ___, 1995 WL 3735 (10th Cir.(Okl.)), Appellant White contended that his employer, York, had failed to accommodate his disability as set forth at 29 C.F.R. §1630, Appx. §1630.9. Specifically, White claimed that York had failed to initiate an informal interactive process with him to ascertain reasonable accommodations, and that such failure operated as a per se preclusion to summary judgment. Id. at 5. The court declined to accept White's reasoning, by stating "White has misconstrued an EEOC recommendation as a statutory requirement." Id. at 5 (Emphasis ours). Clearly, the Tenth Circuit felt the provision White was

relying on was not a mandatory provision.

Yet, in Bolton, the Tenth Circuit held just the opposite. It stated that Bolton had not proved that he was substantially limited in the major life activity of working because he failed to offer evidence on his "vocational training, the geographical area to which he has access, or the number and type of jobs demanding similar training from which Bolton would also be disqualified." Pet. for Cert. at 16A.[2] Those are the very criteria at 29 C.F.R. §1630.2(j)(3)(ii) which Petitioner claims are permissive and Respondent claims are "illustrative."

The Tenth Circuit cannot have it both

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[2] Even if it is determined by this Court that these criteria are mandatory, Bolton claims that the Court of Appeals erred in determining that he did not meet them. The only one of the three that Bolton did not have testimony supporting was the "geographical area" factor. See pages 20-22 of Petition for Certiorari.

ways. The word "may" plainly appears in the text of the regulation. (See Pet. for Cert. at 20C.) Following traditional statutory construction, guidelines which use "shall" or "should" ought to be considered as mandatory, and those which use "may" ought to be considered as permissive. Petitioner feels the Court of Appeals plainly erred in ruling that Bolton's claim failed because he could not show all the factors listed in §1630.2(j)(3)(ii).

Finally, the determination of whether an individual is substantially limited in a major life activity must be a factual determination made on a case-by-case basis. Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993); Elstner v. Southwestern Bell Telephone Co. 659 F.Supp. 1324 (S.D. Tex. 1987), aff'd at 863 F.2d 881 (5th Cir. 1988). The

district court, as well as the Tenth Circuit Court of Appeals, in the instant case, have substituted the jury function in performing the factual determination of whether Bolton was substantially limited in a major life activity. The court's actions are contrary to existing law.

## III. LOGIC AND EXPERIENCE SHED LIGHT ON BOLTON'S CLAIMS

On page 19 of its Brief in Opposition, Respondent chides Bolton for using "logic and human experience" as measurements for determining if Bolton's handicap prevented him from doing a "class of jobs" or a "broad range of jobs in various classes" as required by the ADA. Surely, it would not be necessary for Bolton to call witnesses such as waitresses or stock boys, whose jobs require prolonged standing, walking, and

lifting, (as did Bolton's job of order selector) to come to court and testify that their jobs require such activities. If logic and human experience are out of place in the federal courts of this country, then we have certainly strayed from our legal roots.

## IV. BOLTON IS NOT REQUIRED TO GIVE DIRECT EVIDENCE OF DISCRIMINATORY INTENT

On page 23 of its Brief in Opposition, Respondent argues that Bolton's claim of disability discrimination under the ADA and age discrimination under the ADEA, 29 U.S.C. §623, are "internally contradictory." It fails to point out that the district court resolved this contradiction later in its opinion by stating that Bolton's ADEA argument was, essentially, that Scrivner was using Bolton's disability as a pretext

for age discrimination. See Pet. for Cert. at 28B.

Bolton is not required to present direct evidence of discriminatory intent. Krause v. Dresser Industries, Inc., 910 F2d 674, 677 (10th Cir. 1990). He is only required to show that the employer's proffered explanation is unworthy of credence. Remarks have been held by the Tenth Circuit to be probative of pretext, even if made in jest. Spulak v. K-Mart Corp., 894 F.2d 1150, 1155 (10th Cir. 1990).

In his case, Bolton submitted evidence that he was called "old fart" and that his employer made statements that he was too old to perform the work in question. The evidence also established that the employees who had been terminated were older employees with disabilities, establishing statistical evidence of

discrimination that was not rebutted by Scrivner. Fallis v. Kerr-McGee Corp., 944 F.2d 743 (10th Cir. 1991).

Scrivner's explanation as to why Bolton was terminated, i.e. that he was physically unable to perform the job, violates the ADA and was used by Scrivner as a pretext. If Scrivner had not violated the ADA, then it would not have had a reason to terminate Bolton other than his age.

Further, it is not unusual for plaintiffs to assert differing theories as separate cause of actions, which rely on the same or similar facts. Cases rarely fall within one specific legal classification. Bolton's case contains mixed issues regarding disability and age. Under the facts of his case, it was proper for him to assert both claims since Scrivner terminated him due to his

disability and his age.[3]

## V. THE EFFECT OF THE HICKS CASE ON TITLE VII AND ADEA CASES AT THE SUMMARY JUDGMENT LEVEL NEEDS TO BE DETERMINED BY THIS COURT

Finally, Respondent's and the district court's interpretation of St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), (found at page 25-26 of its Brief in Opposition,) is simply that -- an interpretation. The district court in Bolton, in its Order denying an award of attorney fees to Scrivner, admits that the Hicks case will likely cause confusion in Title VII and ADEA cases. " ... the

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[3] Scrivner seems to argue in a global sense that although an employer may discriminate against a male because of his race and gender, the employee would be forced, as a matter of law, to choose which claim to pursue, since they may be contradictory in nature.

recent Supreme Court decision in Hicks may cause confusion for both courts and litigants in Title VII and ADEA cases, confusion that will only be dispelled by subsequent judicial interpretation." (The full Order is reproduced herein at Appendix A of this Reply.)

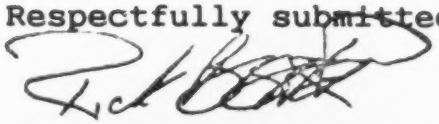
Respondent's claim that the district court was "correct" does nothing to dispel the confusion surrounding the role of summary judgment in employment discrimination cases. Only this Court's interpretation will have that effect.

## CONCLUSION

Summary judgment can be inappropriate even when the basic facts are not disputed. Equally as important are the inferences drawn from the undisputed facts. Bolton's case presented issues which could and should only be resolved by a jury. The Court of Appeals decision

should be vacated, and the case remanded to the district court for trial on the merits.[4]

Respectfully submitted,



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[4] It is interesting to note that a similar case, Hicks v. Scrivner (cite) was recently tried before a jury in the Western District of Oklahoma. The jury found for the plaintiff on his ADA claim and awarded him over $200,000 in damages.

APPENDIX "A"

FILED
Dec 22 1993
Robert D. Dennis
By_____
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

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|---|---|---|
| FLOYD BOLTON, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. CIV 93-364-A |
| | ) | |
| SCRIVNER, INC., | ) | |
| | ) | |
| Defendant. | ) | |

O R D E R

Plaintiff Floyd Bolton brought the instant action alleging violations of the Americans With Disabilities Act (ADA) and the age Discrimination In Employment Act (ADEA), as well as several state law causes of action. Plaintiff claimed that defendant Scrivner, Inc. ("Scrivner") discriminated against him on the basis of

his age and his disability by refusing to allow him to return to his position with the company or to make appropriate accommodations for his physical restrictions. The Court granted defendant's motion for summary judgment because plaintiff failed to provide evidence that he was "disabled," as defined by the ADA, and that defendant's reason for preventing his return (his physical inability to perform the duties of this prior position) was a pretext for age discrimination under ADEA. The Court also dismissed plaintiff's state law claims without prejudice.

As the prevailing party, defendant now makes applications for attorney's fees to be taxed against plaintiff, as well as plaintiff's counsel, pursuant to Fed. R. Civ. P. 11. The Supreme Court has enunciated stringent standards that must

be met before a court may award attorney's fees to a prevailing defendant.

> In sum, a district court any in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was **frivolous, unreasonable, or without foundation,** even though not brought in subjective bad faith. In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been [a] victim . ., no matter how meritorious one's claim may appear at the outset, the course of litigation, is rarely predictable. Decisive facts may not emerge until discovery or trial. . . . Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978) (emphasis added). Under this elevated standard, the Court finds that defendants are not entitled to an award of attorney's fees.

Admittedly, plaintiff's case against Scrivener was thin. In his brief, plaintiff attempts to re-argue legal conclusions that have already failed in this Court. Such argument is best presented to the Court of Appeals. Nevertheless, the factual underpinnings of plaintiff's case were not so flimsy or frivolous as to warrant the award of fees to defendant. As the Court noted, while plaintiff did present evidence of his physical inability to perform the job of order selector, he failed to make the requisite showing that he was disabled as defined by the terms of the ADA and interpreted in relevant case law.

Plaintiff also presented evidence that met his burden of making out a prima facie case under ADEA. The crucial fault was plaintiff's failure to produce evidence of pretext sufficient to create an issue of material fact about defendant's justification and thereby proceed to trial. Nevertheless, it would seem harsh for the Court to tax fees against plaintiff since at least a prima facie case existed under the statute. Finally, while the Court observed that the contradictory nature of the claims compromised plaintiff's ability to prove this case under either federal statute, there is nothing inherently casuistical about such an approach.

Moreover, given the context of developing employment discrimination law, the Court is unwilling to penalize plaintiff for bringing a case where the

law is evolving. The ADA is a relatively new act and its boundaries will only be determined by litigation brought by a wide variety of plaintiffs, many of whom may not prevail on the merits of their case. Similarly, as the Court discussed at length in its order granting summary judgment, the recent Supreme Court decision in Hicks may cause confusion for both courts and litigants in Title VII and ADEA cases, confusion that will only be dispelled by subsequent judicial interpretation.

Defendant also argues that plaintiff's counsel violated his duty to conduct a reasonable inquiry into the facts of plaintiff's case, thereby warranting the taxing of fees under Rule 11. A signature on a pleading certifies to the Court that the party has conducted a reasonable inquiry into the law and

facts of a case and is satisfied that the pleading certifies to the Court that the party has conducted a reasonable inquiry into the law and facts of a case and is satisfied that the pleading is well-groomed. See Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 542 (1991). "If an attorney does not conduct the requisite 'reasonable inquiry,' sanctions are not only justified but must be imposed." Johnson v. McAdoo, 150 F.R.D. 684 (W.D. Okla. 1993). An objective standard is used in determining whether a reasonable and competent attorney would believe in the merits of an argument and sign their name to a filing or pleading. See Dodd Insurance Services, Inc. v. Royal Insurance Co. of America, 935 F.2d 1152,1155 (10th Cir. 1991). The attorney must present a colorable claim in order for it to be objectively reasonable

under the circumstances. Id. As can be inferred from the prior discussion, the Court does not believe that plaintiff's counsel was so derelict in his duty as to warrant sanctions under Rule 11.

Finally, defendant asks that this Court tax expert witness fees incurred in defending against plaintiff's ADA claim. Given the Court's findings with respect to attorney's fees, the Court is not inclined to do so. Moreover, it bears noting that, while 42 U.S.C. § 1988 specifically provides for the taxing of expert witness fees, the Tenth Circuit has held, in the context of ADEA, that such a cost shift is unavailable in the absence of express statutory authority from Congress. See Gray v. Phillips Petroleum Co.. 971 F.2d 591 (10th Cir. 1992). The provision in the ADA that addresses attorney's fees, 42 U.S.C. § 12205, makes no mention of taxing

expert witness costs. Thus, even had the Court ruled favorably on defendant's application with respect to attorney's fees, it appears that it would not be possible for the Court to do the same with respect to expert witness fees.

Defendant's Application for Attorney's Fees is DENIED.

It is so ordered this 22 day of December, 1993.

s/Wayne Alley
WAYNE E. ALLEY
United States District Judge